Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

FIDELMAR OROZCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court, when enhancing a sentence under the United States Sentencing Guidelines, can rely upon disputed hearsay portions of the Presentencing Investigation Report without requiring the government to present additional evidence.

LIST OF PARTIES

The parties to the proceedings below include the United States of America and Fidelmar Orozco.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

SENTENCING GUIDELINE PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Dorman v. Higgins, 821 F.2d 133 (1st Cir. 1993) 10

United States v. Bernardine, 73 F.3d 1078 (11th Cir. 1996) 9

United States v. Burke, 80 F.3d 314 (8th Cir. 1996) 7

United States v. Coonce, 961 F.2d 1268 (7th Cir. 1992) 11

United States v. Darmond, 3 F.3d 1578 (2d Cir. 1993) 12

United States v. Gessa, 971 F.2d 1257 (6th Cir. 1992) 9

United States v. Greene, 71 F.3d 232 (6th Cir. 1995) 9

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997) 9

United States v. Lee, 818 F.2d 1052 (2d Cir. 1987)..... 10

United States v. McGill, 32 F.3d 1138 (7th Cir. 1994) 10

United States v. O'Dell, 965 F.2d 937 (10th Cir. 1992) 10

United States v. Reyna, 130 F.3d 104 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1328 (1998)..... 9

United States v. Singh, 923 F.2d 1039 (3rd Cir. 1991) 7

United States v. Skrodzki, 9 F.3d 198 (1st Cir. 1993) 11

United States v. Williams, 41 F.3d 496 (9th Cir. 1994) 10

Williams v. United States, 503 U.S. 193 (1992) 12

STATUTES AND RULES OF DECISION

18 U.S.C. § 2 .....2, 3

18 U.S.C. § 3231 1

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3742 1

21 U.S.C. § 841(a)(1) 2, 3

21 U.S.C. § 841(b)(1)(A) 2, 3, 12

21 U.S.C. § 841(b)(1)(C) 2, 3

21 U.S.C. § 846 ..... 2, 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

91 F.R.D. 289 11

154 F.R.D. 501 8

FED. R. CRIM. P. 32 ..... 7, 11, 12

U.S.S.G. § 2D1.1 5

U.S.S.G. § 3B1.1(c) 6

U.S.S.G. § 6A1.3 ..... 2, 7

PETITION FOR A WRIT OF CERTIORARI

The petitioner Fidelmar Orozco respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 14, 2000.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is reprinted in the appendix to this petition at App. 1-2.

JURISDICTION

The United States District Court for the Southern District of Texas had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231.

The jurisdiction of the United States Court of Appeals for the Fifth Circuit was based upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The opinion and judgment were entered on April 14, 2000. This petition for writ of certiorari is due on July 13, 2000, the 90th day after the Fifth Circuit issued its opinion and judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

United States Sentencing Guideline § 6A1.3 states in pertinent part:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

STATEMENT OF THE CASE

Petitioner Orozco pleaded guilty to three counts in a multi-count indictment accusing him and others of engaging in various drug offenses. In Count One, Petitioner Orozco was indicted for conspiring to possess with the intent to distribute methamphetamine and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A). In Count Two, Petitioner Orozco was indicted, not for conspiracy, but for the actual distribution of heroin, as well as aiding and abetting others in the distribution of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2. Finally, in Count Three of the indictment, Petitioner Orozco was again indicted for the knowing and intentional distribution of a substance containing heroin, and for aiding and abetting in the distribution of heroin,

in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2.

On December 15, 1997, the district court conducted a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure, for the purposes of deciding whether to accept Mr. Orozco's decision to plead guilty to Counts 1, 2, and 3 of the indictment. At the conclusion of the Rule 11 hearing, the district court accepted Mr. Orozco's guilty plea and found that Mr. Orozco was guilty as charged in Counts 1, 2, and 3 of the indictment. The district court's judgment reflects that Mr. Orozco was convicted of the following offenses:

(1) *Count 1* (under 21 U.S.C. § 846) – for "[c]onspiracy to possess w/intent to distribute more than 1 kilogram of heroin [21 U.S.C. § 841(b)(1)(A)],"

(2) *Count 2* (under 21 U.S.C. § 841(a)(1)) – for "[p]ossession w/intent to distribute less than 100 grams of heroin [21 U.S.C. 841(b)(1)(C)]," and

(3) *Count 3* (under 21 U.S.C. § 841(a)(1)) – for"[p]ossession w/intent to distribute less than 100 grams of heroin [21 U.S.C. 841(b)(1)(C)]." App. 3-4.

The district court held a sentencing hearing on April 6, 1998. Based on the Presentence Investigation Report prepared by the probation officer – and after reducing the total offense level by three for Petitioner Orozco's acceptance of responsibility – the district court sentenced Mr. Orozco to 262 months imprisonment on each of the Counts 1, 2, and 3 (to be served concurrently), ten years supervised release on Count 1 and six years supervised

release on Counts 2 and 3 (also to be served concurrently), and ordered Mr. Orozco to pay a $150.00 assessment. Mr. Orozco appealed.

The presentence investigation report ("PSR") contained the following allegations concerning Mr. Orozco's unadjudicated conduct involving methamphetamine:

> During the latter part of March [1995], Fidelmar Orozco contacted a CI [confidential informant] about purchasing a vehicle capable of transporting 50 kilograms of cocaine from Brownsville to Dallas, Texas. Fidelmar Orozco and Israel Adame met with the CI on April 1, 1995. The CI provided them with a 1982 Pontiac with a hidden compartment. . . . At the meeting, Orozco disclosed that two Hispanic males had arrived in Houston from California with six pounds of methamphetamine. After showing Orozco and Adame how to gain access to the hidden compartment they took custody of the vehicle and departed the area.
>
> On April 4, 1995, agents on surveillance observed Fidelmar Orozco and Israel Adame meet with Rogelio Alvarez at a motel in Dallas. Alvarez had arrived from California to oversee the distribution of methamphetamine. Surveillance also followed Orozco and Adame to 1710 Beckley in Dallas, which was the residence of David Gaona. On April 19, 1995, a CI was debriefed and related that in addition to the six pounds of methamphetamine Orozco received in Houston on April 1, six more pounds of methamphetamine had been delivered for Orozco in Dallas on April 19, 1995. Orozco stated he paid $8,000 per pound but was selling the methamphetamine for $9,000 a pound. He asked the

> CI to help him sell two pounds. Rogelio Alvarez was the source of these twelve pounds (5.4 kilograms) of methamphetamine, according to Fidelmar Orozco.

The PSR held Mr. Orozco accountable for all twelve pounds of the methamphetamine discussed above.

The PSR further concluded that Fidelmar Orozco "was a manager/supervisor of a drug trafficking conspiracy and should be held accountable for the distribution of a total of 379 grams of heroin and 8,011.48 grams of methamphetamine." According to the PSR, the quantity of heroin and methamphetamine attributed to Orozco, for purposes of sentencing guideline calculations, was 8,390.48 kilograms of marijuana. Thus, the PSR computed the base offense level as 34 pursuant to U.S.S.G. § 2D1.1. Additionally, because Orozco was found to be a supervisor or manager, the base offense level was increased by 3 – for a total offense level of 37.

Mr. Orozco objected to the PSR's attributing to him twelve pounds of methamphetamine in April of 1995. Mr. Orozco's objections noted that, "[w]hile there is some corroboration for six of the twelve pounds, . . . there is no direct evidence as to an additional 6 pounds." Mr. Orozco correctly pointed out that it was inconsistent for the CI to have claimed knowledge that six additional pounds of methamphetamine were delivered to Orozco on April 19, 1995, when the CI was being "debriefed" on that very same day, *i.e.*, April 19, 1995. Thus, as Mr. Orozco explained in his objections below, even if there were some corroborating evidence that Orozco received some amount of methamphetamine in April 1995, "there is absolutely no corroboration for the additional six pounds

imputed to Defendant in the CI's April 19, 1995 debriefing."

Mr. Orozco also objected strenuously to the PSR's assertion that he "was a manager/supervisor of a drug trafficking conspiracy," on the basis that the probation officer who prepared the PSR "made no attempt to substantiate this conclusion." As Mr. Orozco pointed out, the evidence in this case "points to many random actions on the part of the defendant and others." Further, there was no evidence establishing that Mr. Orozco had a particular role in the course of his dealings. Alternatively, Mr. Orozco argued that if he had any aggravating role, U.S.S.G. § 3B1.1(c) would only call for an increase in the offense level by 2 (rather than by 3).

At the sentencing hearing, the district court overruled Mr. Orozco's objections to both the quantity of drugs attributed to him and the statement made by the CI about Mr. Orozco's alleged receipt of an additional six pounds of methamphetamine on April 19, 1995, the same day on which the CI was being debriefed by federal agents. Relying solely upon the PSR, the sentencing court found that "the evidence of the operation supports the existence, not just of a hope of having the quantity of drugs that the Government talks about." The district court further found that "Mr. Orozco [was] the most significant" participant among the 15 or so people who were charged in the conspiracy and that therefore, a three-level increase in the offense level was warranted. However, the district court granted Mr. Orozco a three-level reduction based upon his acceptance of responsibility which made Mr. Orozco's guideline range of imprisonment from 210 to 262 months. The district court

then sentenced Mr. Orozco to 262 months in prison, ten years of supervised release, and a $150 tax.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance that directly impacts sentence enhancements that are based upon disputed statements made in a PSR. Moreover, there is a split among the circuits regarding this issue.

There is a Split of Authority Among the Courts of Appeals Regarding the Use of Presentencing Reports as Evidence in Sentencing

The purpose of Federal Rule of Criminal Procedure 32 is to ensure that the defendant's sentence is based on accurate and reliable information. *See United States v. Singh*, 923 F.2d 1039, 1044 (3rd Cir. 1991). As amended in 1994, Rule 32 attempts to make the presentence report more accurate. Because the court's resolution of disputed sentencing factors in the PSR often has a measurable effect on the applicable punishment, greater care in the resolution of such factual disputes is required. *See* U.S.S.G. § 6.A1.3, comment. (backg'd.). Moreover, PSRs are themselves not evidence and therefore, the government must be required to prove at the sentencing hearing those facts stated in the PSR which the defendant is challenging. *See United States v. Burke*, 80 F.3d 314, 316 (8th Cir. 1996).

At Mr. Orozco's sentencing, the trial judge agreed that "every nit makes a substantial difference in the sentence. Th[is] is what the guidelines have done, is make nits seriously important." However, the judge went on to accept as sufficiently reliable a statement made by the CI that Mr. Orozco had, on the same day the CI was being debriefed, received an additional quantity of illegal drugs. No explanation was sought by the court, nor was one offered by the government, as to how the CI would have come by this hearsay information. The court made no attempt to insure the validity of the CI's statement, and, in fact, admitted that it was basing its assessment of the reliability of the CI's statement on a presumption.[1]

Although it is true that the trial court has discretion in accepting the PSR or requesting an evidentiary hearing, it is equally true that the "Sentencing Guidelines specifically provide that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute." *See* 154 F.R.D. 501. Mr. Orozco, being unable to disprove the CI's statement, had to depend upon the government to offer up the necessary additional proof of the veracity of the CI's statement. The CI, and therefore the government, was in a position to explain how it was that the CI could know what he claimed to know. This was neither done, nor requested by the sentencing court.

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[1] "If he is debriefing on the 19th, he says that we have been dealing with these drugs, and today, presumably, I agree, or earlier today . . . there's enough detail to make that consistent and credible."

The Fifth Circuit has held that a sentencing court need not consider additional evidence when a defendant challenges factual assertions in a PSR. *See e.g., United States v. Reyna*, 130 F.3d 104, 112 (5th Cir. 1997) (district court may adopt disputed facts), *cert. denied*, 118 S. Ct. 1328 (1998). However, Mr. Orozco contends that this Court should instead follow the contrary position of numerous other circuits listed below:

8th Circuit	*United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997) ("[W]hen the defendant makes a timely objection to the PSR, '[i]f the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report' ").
11th Circuit	*United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996) (when a defendant objects to factual recitations in PSR that support a sentencing enhancement, the prosecution has the burden to offer "specific and reliable evidence" sufficient to prove the PSR's disputed allegations by a preponderance of the evidence).
6th Circuit	*United States v. Greene*, 71 F.3d 232, 236 (6th Cir. 1995) (prosecution must offer evidence and cannot rely on PSR in order to prove sentencing enhancement when the defendant objects to the factual findings in the PSR that support its recommendation for the sentencing enhancement); *United States v. Gessa*, 971 F.2d 1257, 1266 n.7 (6th Cir. 1992) (PSR is not "evidence"

on which the prosecution may rely to prove sentencing enhancement).

10th Circuit — *United States v. O'Dell*, 965 F.2d 937, 938 (10th Cir. 1992) (district court may rely on factual allegations in PSR concerning a sentencing enhancement only if those allegations are "uncontested" by the defendant; otherwise, prosecution has the burden to "produce evidence" at the sentencing hearing and prove disputed enhancement by preponderance of the evidence).[2]

Cf. United States v. Williams, 41 F.3d 496, 499-500 (9th Cir. 1994) (sentencing judge may consider hearsay evidence, but evidence must be reliable. District court erred in relying on hearsay upon hearsay when imposing sentence enhancement); *United States v. McGill*, 32 F.3d 1138 (7th Cir. 1994) (Hearsay is permitted in sentencing proceedings, but the court may only rely upon hearsay when it is reliable and defendant has a reasonable opportunity to

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[2] The Second Circuit took this position in pre-Guidelines cases, although that court has apparently not addressed the issue in a case applying the Guidelines. *See Dorman v. Higgins*, 821 F.2d 133, 138 (2d Cir. 1987) ("If the defendant alleges the [presentence] report is inaccurate in any respect, the sentencing court may not take the controverted part of the report into account in imposing sentence unless it has found that the government has established by a preponderance of the evidence . . . that the controverted statements are accurate."); *United States v. Lee*, 818 F.2d 1052, 1055-57 (2d Cir. 1987) (if defendant objects to sentencing enhancement in PSR, prosecution must proffer evidence in support of the disputed portion of PSR).

rebut the hearsay); *United States v. Coonce*, 961 F.2d 1268, 1280 (7th Cir. 1992) (if the defendant offers "some evidence beyond a mere denial calling the reliability or the correctness of the alleged facts [in the PSR] into question," then "the burden shifts back to the prosecution," which must offer evidence other than the PSR itself).

But see United States v. Skrodzki, 9 F.3d 198, 201-02 (1st Cir. 1993) (district court may simply adopt disputed factual findings in PSR and properly refuse to conduct an evidentiary hearing on disputed sentencing issues).

Those circuits which interpret Rule 32 as requiring the government to provide additional evidence once aspects of the PSR have been objected to by the defendant, maintain the integrity and purpose of Rule 32. This is especially true considering that the defendant's interest in an accurate and reliable PSR does not end with sentencing. Throughout the defendant's correctional process experience, the PSR accompanies the defendant and influences classification within the system, furlough opportunities, and treatment program options. Moreover, the PSR plays a critical role during parole determination. *See* 91 F.R.D. 289, 349-50.

If all or some of the objected-to quantities of methamphetamine attributed to Mr. Orozco in the PSR were eliminated from the guideline analysis and there had been no three-level adjustment for Mr. Orozco's role in the offense (or only a two-level adjustment, as Mr. Orozco alternatively argued), then Mr. Orozco's total offense level – with the three-point reduction for acceptance of responsibility – would have been between 29 and 33.

Reducing the total offense level to 33, even with a criminal history category of IV, would have produced a guideline sentence range of 188-235 months, which is substantially lower than the 262-month sentence that Mr. Orozco received. Under these circumstances, then, the district court's refusal to conduct an evidentiary hearing on the amounts of methamphetamine attributable to Mr. Orozco, and his alleged managerial role, constituted harmful error. *See Williams v. United States*, 503 U.S. 193, 202, 112 S. Ct. 1112, 1120 (1992).[3]

CONCLUSION

The practice of sentencing courts within the First and Fifth Circuits, of refusing to require that the government offer up additional information when presentence report information is challenged, circumvents the purpose of Rule 32 and, therefore, makes any challenge to a PSR meaningless. Therefore, for the reasons stated herein, a writ of certiorari should be granted in this case. The

[3] The government may argue that no harm resulted because Mr. Orozco would have been subject to a mandatory minimum sentence of 240 months (or 20 years) pursuant to 21 U.S.C. § 841(b)(1)(A). However, because the judgment in this case only found Mr. Orozco guilty of a conspiracy to possess heroin – and because the amount of heroin attributed to Mr. Orozco was less than 1 kilogram – it is questionable whether the mandatory minimum sentence of 20 years could apply in this case. *See United States v. Darmond*, 3 F.3d 1578, 1581 (2d Cir. 1993) (mandatory minimum sentences in section 841(b)(1) apply only to conduct that actually resulted in conviction under section 841(a)).

judgment of the Court of Appeals should be reversed, the challenged presentence report information should be excluded from consideration, and Mr. Orozco should be resentenced accordingly.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20349
Conference Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FIDELMAR OROZCO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-95-CR-314-1

(Filed Apr. 14, 2000)

Before WIENER, DeMOSS and PARKER, Circuit Judges.

PER CURIAM:*

Fidelmar Orozco appeals from the judgment entered after he pleaded guilty to conspiracy to possess heroin and two counts of possession of heroin with intent to distribute.

Orozco argues that his conviction cannot be affirmed until the record is supplemented with a page missing

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

from the indictment. The Government included the missing page in its record excerpts, and Orozco has not filed a reply brief or responded in any other way to the production of the missing page. Accordingly, we conclude that Orozco has abandoned any argument relating to the sufficiency of the indictment. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).[1]

Orozco argues that the district court erred when, despite his objections, it did not require the Government to produce evidence in support of information contained in the presentence report (PSR). As he concedes, however, we have previously held that a defendant's failure to present any evidence in support of his objections means that the sentencing court is "free to adopt [the PSR's] findings without further inquiry or explanation." *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995).

AFFIRMED.

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[1] We note that Orozco "[bore] the burden of creating the record on appeal." *United States v. Coveney*, 995 F.2d 578, 587 (5th Cir. 1993).

United States District Court
Southern District of Texas

UNITED STATES OF AMERICA

v.

FIDELMAR OROZCO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Apr. 13, 1998)

Case Number:
4:95CR00314-001

Russell Henderson
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) 1, 2, and 3 on December 15, 1997

* * *

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to possess w/intent to distribute more than 1 kilogram of heroin. [21 USC 841(b)(1)(A)]	10/10/1995	1
21 U.S.C. § 841(a)(1)	Possession w/intent to distribute less than 100 grams of heroin [21 USC 841(b)(1)(C)]	12/13/1994	2

21 U.S.C. § 841(a)(1)	Possession w/intent to distribute less than 100 grams of heroin [21 USC 841(b)(1)(C)]	03/22/1995	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 465-33-6742

Defendant's Date of Birth: 12/15/1952

Defendant's USM No.: 76050-079

Defendant's Residence Address:
7820 Junior

Houston TX 77012

Defendant's Mailing Address:
7820 Junior

Houston TX 77012

04/06/1998
Date of Imposition of Judgment

/s/ Illegible
Signature of Judicial Officer

LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

4-10-98
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 262 month(s).

The term consists of TWO HUNDRED SIXTY TWO (262) MONTHS on each of Counts 1, 2, and 3 to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 year(s)

The term consists of **TEN (10) YEARS** as to Count 1, and **SIX (6) YEARS** as to Counts 2 and 3, to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. 3013;

15) the defendant shall notify the U. S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the

probation office reactivates automatically upon the defendant's reporting.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 150.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ 0.00.

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other monetary penalties shall be due as follows:

A [X] in full immediately; or

* * *

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court finds that this defendant should receive a three-level reduction for acceptance of responsibility.

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: IV

Imprisonment Range: 240 to 262 months

Supervised Release Range: 10 to 10 years

Fine Range: $ 17,500.00 to $ 12,000,000.00

[X] Fine is waived or is below the guideline range because of inability to pay.

Total Amount of Restitution: $ 0.00

* * *

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * *

Supreme Court, U.S.
FILED
DEC - 6 2000
CLERK

(2)

No. 00-194

In the Supreme Court of the United States

FIDELMAR OROZCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court complied with Federal Rule of Criminal Procedure 32(c)(1) when it relied on the presentence investigation report in making its factual findings regarding the amount of drugs attributable to petitioner and petitioner's role in the offense.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 120 S. Ct. 2348 (2000)	8
Dorman v. *Higgins*, 821 F.2d 133 (2d Cir. 1987)	11, 12
Huerta v. *United States*, cert. denied, 120 S. Ct. 1238 (2000) (No. 99-6807)	9
Sidney v. *United States*, cert. denied, 121 S. Ct. 97 (2000) (No. 99-9585)	9
United States v. *Bernardine*, 73 F.3d 1078 (11th Cir. 1996)	11
United States v. *Burke*, 80 F.3d 314 (8th Cir. 1996)	13
United States v. *Coonce*, 961 F.2d 1268 (7th Cir. 1992)	11
United States v. *Gessa*, 71 F.3d 232 (6th Cir. 1992)	11, 12
United States v. *Greene*, 71 F.3d 232 (6th Cir. 1995)	11
United States v. *Hudson*, 129 F.3d 994 (8th Cir. 1997)	12
United States v. *Lee*, 818 F.2d 1052 (2d Cir.), cert. denied, 484 U.S. 956 (1987)	12
United States v. *O'Dell*, 965 F.2d 937 (10th Cir. 1992)	11
United States v. *Raven*, 39 F.3d 428 (3d Cir. 1994)	10

Cases—Continued: Page

United States v. *Reyna*, 130 F.3d 104 (5th Cir. 1997) 7
United States v. *Skrodzki*, 9 F.3d 198 (1st Cir. 1993) 10
United States v. *Taylor*, 72 F.3d 533 (7th Cir. 1995) 10
United States v. *Terry*, 916 F.2d 157 (4th Cir. 1990) 10
United States v. *Wise*, 976 F.2d 393 (8th Cir. 1992), cert. denied, 507 U.S. 989 (1993) 13
United States v. *Yates*, 22 F.3d 981 (10th Cir. 1994) 10, 11-12

Statutes and rules:

18 U.S.C. 2 ..... 2, 4
21 U.S.C. 841(a)(1) 2, 4
21 U.S.C. 841(b)(1) 2
21 U.S.C. 841(b)(1)(A) 5, 8, 16
21 U.S.C. 841(b)(1)(A)(i) 4
21 U.S.C. 841(b)(1)(A)(viii) 4
21 U.S.C. 841(b)(1)(C) 4, 8
21 U.S.C. 846 ..... 2, 4, 5
21 U.S.C. 851 5
Fed. R. Crim. P.:
Rule 32(b)(6)(D) 9
Rule 32(c)(1) 9, 10
United States Sentencing Guidelines:
§ 2D1.1, comment. (n. 10) (1995) 5
§ 2D1.1(c)(3) 5
§ 2K2.1(a)(6) 11
§ 6A.1.1 11
§ 6A1.3(a) 10

In the Supreme Court of the United States

No. 00-194

FIDELMAR OROZCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 213 F.3d 638 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2000. The petition for a writ of certiorari was filed on July 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess heroin

with intent to distribute it, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(b)(1); and two counts of aiding and abetting the distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to 262 months' imprisonment, to be followed by ten years' supervised release. The court of appeals affirmed. Pet. App. 1-2, 5.

1. Petitioner was the leader of a drug trafficking organization that distributed black tar heroin in Texas and Chicago, Illinois. Presentence Investigation Report (PSR) ¶ 4. Beginning in December 1994, the Houston High Intensity Drug Trafficking Task Force used several confidential informants to infiltrate petitioner's organization. Thereafter, petitioner and his confederates engaged in numerous drug transactions involving informants. *Ibid.*

a. On December 13, 1994, an informant introduced an undercover officer to petitioner and his brother to negotiate the purchase of black tar heroin. That same day, petitioner delivered 48.8 grams of black tar heroin in exchange for $4400. PSR ¶ 7. Between January 10 and 21, 1995, petitioner negotiated for the sale of 178.8 grams of black tar heroin in a transaction that was ultimately consummated in Chicago, Illinois. *Id.* ¶¶ 8-9. On March 22, 1995, petitioner and another man sold a confidential informant 1.7 grams of black tar heroin for $250. *Id.* ¶ 11. In negotiations culminating on March 25, 1995, petitioner and another man caused 49.7 grams of black tar heroin to be distributed to a confidential informant in exchange for $5000. *Id.* ¶ 12. Between June 23 and July 6, 1995, petitioner and another accomplice negotiated the delivery of 100 grams of black tar heroin in exchange for $8000. *Id.* ¶¶ 18, 20.

b. Petitioner's organization also distributed other drugs, including methamphetamine and cocaine. PSR

¶ 4. During the latter part of March 1995, petitioner contacted a confidential informant about purchasing a vehicle capable of transporting 50 kilograms of cocaine from Brownsville, Texas to Dallas, Texas. On April 1, 1995, petitioner and another man met with the informant to obtain the car. During that meeting, petitioner disclosed that two men had arrived in Houston from California with six pounds of methamphetamine. *Id.* ¶ 13. On April 4, 1995, agents observed petitioner and another man meet in a Dallas motel with Rogelio Alvarez, who had arrived from California to oversee the distribution of methamphetamine. Petitioner and the other man then went to the residence of David Gaona, also in Dallas. *Id.* ¶ 14.

Shortly thereafter (on April 19, 1995), a confidential informant told government agents that an additional six pounds of methamphetamine had been delivered to petitioner in Dallas. PSR ¶ 14. According to the informant, petitioner had stated that he had paid $8000 per pound for the methamphetamine, but was selling it for $9000 a pound, and that Alvarez was the source of all 12 pounds. Petitioner had asked the informant to help him sell two pounds. *Ibid.* A confidential informant, on April 21, 1995, spoke with petitioner by phone and agreed to purchase one pound of methamphetamine. Petitioner then called David Gaona at his Dallas residence, and Gaona later met with the informant and an undercover agent outside a restaurant to complete the sale. The methamphetamine delivered by Gaona weighed 411.48 grams. *Id.* ¶ 15. At a meeting on May 3, 1995, petitioner was paid $4000 for those drugs and received a $5000 credit toward the car purchase, for a total price of $9000. *Id.* ¶ 16.

On May 8, 1995, a confidential informant told government agents that petitioner owed $38,000 to the Mexi-

can source of the 12 pounds of methamphetamine. The informant also disclosed that the methamphetamine was transported from San Jose, California, between April 1 and April 19, 1995, and that Alvarez was the person responsible for distributing it. The informant reported that petitioner had told him that he was expecting another 12-pound shipment of methamphetamine by the end of the week. PSR ¶ 17.

c. Finally, on April 14, 1997, Drug Enforcement Administration agents observed petitioner retrieve a box from a residence and then depart in a Ford Explorer. Agents following petitioner lost sight of the Explorer, but noticed the box sitting on a curb. They retrieved the box, which contained 2.2 kilograms of methamphetamine. Petitioner's vehicle was stopped and all of its occupants admitted that petitioner had picked up a box and then entered the vehicle. Although they denied that petitioner had placed the box on the curb, they could not explain what had happened to the box after petitioner entered the Explorer. PSR ¶¶ 25, 26.

2. On December 20, 1995, a grand jury sitting in the Houston Division of the Southern District of Texas issued a 13-count indictment charging petitioner and 16 others with various drug offenses. Petitioner was charged with conspiracy to possess heroin and methamphetamine with intent to distribute them, in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(A)(i) and (viii) (Count One); and two counts of aiding and abetting a distribution of heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(C) and 18 U.S.C. 2 (Counts Two and Three). On December 15, 1997, petitioner pleaded guilty to all counts. Gov't C.A. Br. 2-3.

a. A PSR prepared by the Probation Office attributed 379 grams of heroin and 8011.48 grams of methamphetamine to petitioner for sentencing pur-

poses. PSR ¶ 27. The methamphetamine consisted of the six pounds petitioner received on or about April 1, 1995, the six pounds he received on or about April 19, 1995, the one pound he distributed on April 21, 1995, and the 2.2 kilograms he abandoned on April 14, 1997. See pp. 3-4, *supra*. Under the applicable guidelines, the 379 grams of heroin and 8011 grams of methamphetamine were equivalent to 8390.48 kilograms of marijuana, giving petitioner a base offense level of 34. *Id.* ¶¶ 27, 33.[1] The Probation Office also recommended that petitioner receive a three-level upward adjustment for his role as a "manager/supervisor" in the offense. *Id.* ¶ 27, 36. Because petitioner had three prior drug convictions, petitioner was placed in criminal history category IV. *Id.* ¶¶ 43-47.[2]

b. Petitioner filed written objections to the PSR, challenging the Probation Office's calculation of the quantity of methamphetamine he distributed. In particular, petitioner challenged the confidential informant's report that he had received six pounds of metham-

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[1] The Probation Office used the 1995 version of the Sentencing Guidelines, which equated one gram of methamphetamine or heroin with one kilogram of marijuana. Sentencing Guidelines § 2D1.1, comment. (n.10) (1995). Those Guidelines assigned a base offense level of 34 to any quantity of marijuana between 3000 kilograms and 9999 kilograms. Sentencing Guidelines § 2D1.1(c)(3).

[2] Under 21 U.S.C. 841(b)(1)(A), any person who commits a violation of Section 846 involving 500 grams or more of methamphetamine and who has two or more prior felony drug convictions "shall be sentenced to a mandatory term of life imprisonment without release." In this case, however, the government's notice of prior convictions under 21 U.S.C. 851 inadvertently included only one of petitioner's convictions. 4/6/98 Sent. Tr. 5-6 ("[Petitioner] received a break because we didn't know about [the other prior convictions].").

phetamine on April 19, 1995, arguing that the informant's credibility was "suspect, at best" because his report was uncorroborated and was made on the same day petitioner allegedly received the drugs. See First Amended Objections to Presentence Investigation Report at 1 (Defendant's Objections). Petitioner also complained that the 2.2 kilograms left at the curb should not be attributed to him. *Id.* at 1-2. Finally, petitioner objected to the PSR's conclusion that he was a "manager/supervisor" of the drug trafficking conspiracy. In the alternative, petitioner argued that he should have received a two-level increase, rather than a three-level increase, because he was involved in a relatively small criminal enterprise. *Id.* at 2-3.

In a written addendum to the PSR, the probation officer declined to make any changes to the report. With respect to the six pounds of methamphetamine received on April 19, 1995, the addendum noted that the confidential informant had previously provided truthful and reliable information, and that this information was corroborated by the one-pound sale on April 21, 1995 for the same price that the informant reported that petitioner would charge. Second Addendum to Presentence Report at 1. As for the 2.2 kilograms of methamphetamine abandoned on April 14, 1997, the addendum concluded that it was reasonable to infer that petitioner placed it on the curb during the moment the agents lost sight of the Explorer. *Id.* at 2. Finally, the addendum noted that both electronic surveillance and statements from petitioner's co-conspirators supported the conclusion that petitioner "held decision making authority over other criminal participants." *Ibid.*

c. At a sentencing hearing held on April 6, 1999, the court overruled petitioner's objection to the quantity of

methamphetamine the PSR attributed to him, concluding that "the evidence of the operation supports the existence, not just of a hope of having the quantity of drugs that the Government talks about." 4/6/98 Sent. Tr. 2-3; see *id.* at 6 ("The five pounds in the box is perfectly attributable to him."). The court also concluded that petitioner had played an aggravated role in the offense, noting that he was "the most significant" participant of the 15 people indicted. *Id.* at 5. At the same time, the court granted petitioner a three-level downward adjustment for acceptance of responsibility, resulting in an offense level of 34 and a punishment range of 210 to 262 months. *Id.* at 12-13.

3. Petitioner appealed, arguing that the district court erred in relying at sentencing on disputed statements in the PSR. Pet. C.A. Br. 10. Once a defendant objects to a factual statement in the PSR, petitioner contended, the court can rely on that statement only if the prosecution offers evidence or testimony to support it. *Id.* at 13-14. While acknowledging that Fifth Circuit precedent foreclosed that claim, *id.* at 14-16 (citing *United States* v. *Reyna*, 130 F.3d 104, 112 (5th Cir. 1997)), petitioner indicated that he wished to preserve the issue for possible review by this Court. *Id.* at 16.

The court of appeals affirmed in an unpublished *per curiam* opinion. Pet. App. 1-2. The court noted that, under circuit precedent, "a defendant's failure to present any evidence in support of his objections means that the sentencing court is 'free to adopt [the PSR's] findings without further inquiry or explanation.' *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995)." *Id.* at 2.

ARGUMENT

Petitioner contends (Pet. 7-12) that the district court erred in relying on the PSR at sentencing because the government did not offer any additional evidence after he objected to certain statements in the PSR. That claim does not warrant review by this Court.[3]

1. Petitioner appears to contend that the district court should have held an evidentiary hearing to resolve his objections to the PSR. Pet. i, 8 (faulting district court for not "requesting an evidentiary hearing"). This case, however, does not properly present that issue. Although petitioner did file written objections to certain conclusions in the PSR, he did not request an evidentiary hearing. Instead, petitioner merely challenged the weight or reliability of the infor-

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[3] Petitioner does not raise any claim under *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), nor does the sentence in this case involve any *Apprendi* error. Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. The district court relied on 21 U.S.C. 841(b)(1)(A), which applies, *inter alia*, to offenses involving more than 500 grams of a mixture or substance containing methamphetamine and authorizes a sentence up to life imprisonment. Even without considering the quantity of drugs involved in his offense, however, petitioner was subject to a maximum sentence of 360 months' imprisonment. See 21 U.S.C. 841(b)(1)(C) (providing for a sentence of not more than 30 years' imprisonment for any offense involving a schedule I or II controlled substance, without regard to quantity, if the defendant "commits such a violation after a prior conviction for a felony drug offense has become final"). Here, the government gave proper notice that petitioner was subject to sentencing as a recidivist. See p. 5, note 2, *supra*. Petitioner's sentence of 262 months' imprisonment falls within the range authorized by Section 841(b)(1)(C).

mation cited by the probation officer and the propriety of relying on that information. Because such a challenge is not the equivalent of a request for an evidentiary hearing, the question of whether the court must hold such a hearing, if requested, is not presented here.[4]

2. Even if petitioner had requested an evidentiary hearing, his claim would not warrant further review. This Court recently declined to review substantively identical claims in *Sidney* v. *United States*, cert. denied, 121 S. Ct. 97 (2000) (No. 99-9585), and *Huerta* v. *United States*, cert. denied, 120 S. Ct. 1238 (2000) (No. 99-6807). There is no reason for a different result here.

a. Notwithstanding petitioner's contentions (Pet. 7, 11), neither the Federal Rules of Criminal Procedure nor the Sentencing Guidelines require the government to offer evidence beyond that provided by the PSR simply because a defendant objects to one or more of the PSR's findings. Federal Rule of Criminal Procedure 32(b)(6)(D) authorizes a district court to adopt the PSR's factual findings at sentencing "[e]xcept for any unresolved objection." For "each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed. R. Crim. P. 32(c)(1). A "court may, *in its discretion*, permit the parties to introduce testimony or other evi-

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[4] A defendant who objects to findings in the PSR may not want to test those findings at an evidentiary hearing for fear that the evidence presented will support an increase in the applicable offense level. Accordingly, a defendant who fails to request an evidentiary hearing should not be allowed to claim on appeal that the district court should have held such a hearing *sua sponte*.

dence on the objections." *Ibid.* (emphasis added). The Sentencing Guidelines similarly provide that, when a defendant "reasonably * * * dispute[s]" any factor important to the sentencing determination, the district court must give the defendant an "adequate opportunity to present information to the court regarding that factor." Sentencing Guidelines § 6A1.3(a).

The district court complied with those requirements here. After reviewing the PSR and petitioner's objections, the court reasonably overruled those objections, finding that petitioner was responsible for the 8011.48 grams of methamphetamine, and that he was a leader of the conspiracy. 4/6/98 Sent. Tr. 2-3. Although petitioner objected to the sources of information relied upon by the PSR, none of his objections justified an evidentiary hearing (see pp. 13-16, *infra*), especially since petitioner neither presented nor offered to present contradictory evidence. Under those circumstances, the district court did not err in determining that the PSR, notwithstanding petitioner's objections, was sufficient to establish each of the relevant facts by a preponderance of the evidence.

b. Contrary to petitioner's contention (Pet. 9-11), there is no conflict between the decision below and that of other courts of appeals that warrants review in this case. Several courts of appeals, along with the Fifth Circuit, have held that a district court may rely on factual assertions in a PSR notwithstanding a defendant's objections if the defendant does not present contrary evidence. See, *e.g.*, *United States* v. *Taylor*, 72 F.3d 533, 547 (7th Cir. 1995); *United States* v. *Raven*, 39 F.3d 428, 434-435 (3d Cir. 1994); *United States* v. *Yates*, 22 F.3d 981, 989 (10th Cir. 1994); *United States* v. *Skrodzki*, 9 F.3d 198, 201-202 (1st Cir. 1993); *United States* v. *Terry*, 916 F.2d 157, 162 (4th Cir. 1990). Those

decisions follow from the understanding that the PSR, developed by an officer of the court after a thorough investigation, bears sufficient indicia of reliability that its findings cannot be overcome by a bare objection, unsubstantiated by any proffer of evidence. See *United States* v. *Coonce*, 961 F.2d 1268, 1278-1280 (7th Cir. 1992); see also Sentencing Guidelines § 6A1.1.

Although petitioner argues that other circuits have adopted a different approach, Pet. 9-11, petitioner often relies on cases in which the government was required to produce additional evidence only *after* the defendant had adduced sufficient evidence to support his objection to the PSR. For example, in *United States* v. *Greene*, 71 F.3d 232, 235 (6th Cir. 1995) (cited Pet. 9), the district court heard testimony "from the defendant himself" about the alleged inaccuracies in the PSR; in that case, moreover, the PSR's finding regarding an enhancement for risk of serious bodily injury was based on an FBI report the defendant was not permitted to review, depriving him of an adequate opportunity to respond. *Id.* at 236. Similarly, in *United States* v. *Bernardine*, 73 F.3d 1078, 1081 (11th Cir. 1996) (cited Pet. 9), the defendant "presented four witnesses at the sentencing hearing" in support of his objection to the PSR's finding that he was a "prohibited person" under Sentencing Guidelines § 2K2.1(a)(6).[5] In the face of the

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[5] In some of the cases petitioner cites, the issue petitioner seeks to raise here was never squarely addressed. See *United States* v. *O'Dell*, 965 F.2d 937, 938 (10th Cir. 1992); *United States* v. *Gessa*, 971 F.2d 1257, 1265 n.7 (6th Cir. 1992); *Dorman* v. *Higgins*, 821 F.2d 133, 138 (2d Cir. 1987). In *O'Dell*, the Tenth Circuit stated that contested facts in a PSR must be established by a preponderance of the evidence; because the defendant in that case did not object to the PSR, however, the court had no occasion to apply that principle. 965 F.2d at 938. Furthermore, in *Yates*, 22 F.3d at

defendants' evidence in those cases, the PSRs did not support the factual findings that were necessary to impose the enhancements.[6]

Petitioner's primary claim seems to be that the standard employed by the Fifth Circuit in this case conflicts with the approach of the Eighth Circuit. See Pet. 7, 9. The Eighth Circuit requires that a district court's findings at sentencing, if made over a defendant's objection, have record support. See, *e.g.*, *United States* v. *Hudson*, 129 F.3d 994, 995 (8th Cir. 1997) ("[W]hen the defendant makes a timely objection to the PSR, '[i]f the sentencing court chooses to make a

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989, the Tenth Circuit took an approach more like that of the Fifth Circuit. There, because the defendant had objected without any evidence to support the objection, the court of appeals concluded that the district court did not commit clear error in adopting the finding in the PSR. *Ibid.* In *Gessa*, the Sixth Circuit did not discuss whether a hearing or production of evidence is required in order to overrule a defendant's objection to a finding in the PSR; in that case, the district court had sustained the defendant's objection. 971 F.2d at 1265 n.7. Finally, *Dorman* involved a probation officer's absolute immunity from suit for preparation of an inaccurate PSR. The Second Circuit did not address the district court's adoption of findings in the PSR, but simply stated that a court cannot rely on a controverted statement in the PSR unless it has found the statement to be accurate by a preponderance of the evidence. 821 F.2d at 138. Similarly, in the other Second Circuit case petitioner cites (Pet. 10 n.2), the court simply stated that the preponderance of the evidence standard applies to findings at sentencing. See *United States* v. *Lee*, 818 F.2d 1052, 1056-1057 (2d Cir.), cert. denied, 484 U.S. 956 (1987).

[6] By contrast, in *Yates*, 22 F.3d at 989, although the defendant objected to the information contained in the PSR, the Tenth Circuit upheld the PSR's findings, because the defendant "failed to present any evidence whatsoever to contradict" the PSR. Here, as in *Yates*, petitioner challenged the factual findings in the PSR without proffering any evidence that supported his challenge.

finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report.'") (quoting *United States* v. *Burke*, 80 F.3d 314, 316 (8th Cir. 1996)). Although there is some tension between that approach and the standard employed by the Fifth Circuit, it is far from clear that petitioner would have prevailed under the Eighth Circuit's approach. Petitioner offered no evidence to support his contention that he was not responsible for the quantity of methamphetamine attributed to him in the PSR; he did not offer to produce such evidence; he did not ask for a hearing; and, as explained below (see pp. 14-16, *infra*), his objections to the PSR were wholly insubstantial. As a result, the district court had before it only the uncontroverted PSR. Under those circumstances, the result in this case likely would have been the same, even if it has arisen in the Eighth Circuit. See *United States* v. *Wise*, 976 F.2d 393, 403 (8th Cir. 1992) (en banc) ("The determination of whether hearsay is sufficiently reliable to warrant credence for sentencing purposes necessarily depends upon the particular circumstances of each case."), cert. denied, 507 U.S. 989 (1993).

Indeed, petitioner's objections to the PSR were not sufficient to warrant a hearing, regardless of the applicable standard. With respect to the quantity of drugs involved, petitioner does not object to the district court's reliance on the six-pound delivery of methamphetamine made to petitioner on or about April 4, 1995.[7]

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[7] To the contrary, petitioner repeatedly has acknowledged that the informant's information regarding the April 4, 1995, delivery was corroborated by other evidence. Defendant's Objections at 1 (acknowledging that the surveillance of defendant and two other men corroborated this information); 4/6/98 Sent. Tr. 3 ("I could understand how the Court could find that there would be some

Nor does he contend, before this Court, that it was error to include the 2.2 kilograms he left on the curb on April 14, 1997.[8] Instead, petitioner devotes his efforts (Pet. 5-6, 8) to disputing the PSR's finding that he received a second six-pound delivery on or about April 19, 1995. That second six-pound delivery, however, had no effect on petitioner's base offense level. Instead, the six pounds received on April 1, 1995, and the 2.2 kilos he abandoned on April 14, 1997, were more than sufficient to establish a base offense level of 34. See p. 5, note 1, *supra*. Thus, even if the district court erred in failing *sua sponte* to take evidence on this matter, that error had no effect on petitioner's sentence.

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substantiating evidence as to six pounds."); Pet. C.A. Br. 13 (failing to challenge district court's finding regarding these drugs); PSR ¶¶ 13, 14, 17, 22 (describing corroborating evidence).

[8] In the court below, petitioner did claim that the 2.2 kilograms left at the curb could not be attributed to him. He did not deny, however, that he carried a box from a residence to a Ford Explorer; that he left in the Ford Explorer; that an identical box was left on the curb; or that, when he was stopped moments later, he did not have the box he had been carrying and could not explain where the box had gone. Instead, before the district court, petitioner argued that the drugs found in the box could not be attributed to him because (1) no one saw him drop the box on the curb; (2) he was not arrested or charged with a possession offense; and (3) the conduct was not within the "parameters" of the conspiracy alleged in the indictment. Defendant's Objections at 1-2. All three of those objections could be resolved by the district court without taking additional testimony, because all three raise legal rather than factual disputes. The first disputes whether the circumstantial evidence of petitioner's involvement with the box was sufficient given the absence of an eyewitness who actually saw him leave the box on the curb (it was); and the other two dispute whether the conduct legally could be considered at sentencing (it can).

Petitioner's objections to inclusion of the April 19, 1995, six-pound delivery, moreover, were not well founded. Petitioner claimed that the confidential informant's statements regarding that delivery were uncorroborated. That claim, however, was refuted by the PSR. See p. 6, *supra*. Moreover, petitioner's sole basis for casting doubt on the informant's credibility was the fact that the informant reported the April 19, 1995, delivery to the police on the very day the delivery was made. Pet. 5-6. As the district court observed at sentencing, the fact that the informant told the police about the drugs on the same day petitioner received them did not render his credibility "suspect," because it is reasonable to presume that the drugs had arrived earlier that day. 4/6/98 Sent. Tr. 5.

Finally, petitioner claims that he was not a "manager" or "supervisor" of the drug conspiracy. But that claim did not warrant a hearing either. The PSR is replete with specific information indicating that petitioner had directed members of his family and other coconspirators in the distribution of drugs. See PSR ¶ 7, 9, 11, 12, 14, 15, 18, 20, 26. Faced with that evidence, petitioner did not deny that he instructed others throughout the conspiracy. Instead, he attempted to distinguish between "giving orders as his part in a hierarchy" and simply "telling someone who he knew to run some errand for him." Defendant's Objections at 2. The district court could resolve the validity of such a distinction without hearing the abundant evidence of petitioner's aggravated role. Because none of petitioner's objections raised any ground to believe that an evidentiary hearing was called for, the district court did not abuse its discretion in declining to call for one *sua sponte*, and petitioner's sentence would have been

properly affirmed regardless of the circuit in which his case arose.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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[9] Petitioner pleaded guilty to Count One, which charged a conspiracy to distribute heroin and methamphetamine. Gov't C.A. Br. 2. See 12/15/97 Sent. Tr. 6-7, 12-14. The judgment filed on April 13, 1998, however, indicates that he was convicted of a "conspiracy to possess w/intent to distribute more than 1 kilogram of heroin." Pet. App. 3. Citing that error (Pet. 12 n.3), petitioner suggests that he was not properly subject to a 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A). See PSR ¶ 59. Because petitioner's proper Sentencing Guidelines range exceeded 20 years without reference to the mandatory minimum, there is no need to resolve that question here.